



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

---

In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.

[REDACTED] Respondent

FOF/153908

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed December 04, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was commenced on --, 2014, adjourned to let Respondent obtain counsel and concluded on March 19, 2014, at Sheboygan, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

Department of Health Services  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Nadine Stankey

Office of the Inspector General  
Department of Health Services  
1 West Wilson Street  
Madison, WI 53701

**Respondent:**

[REDACTED]  
[REDACTED]  
[REDACTED]

**Petitioner's Representative:**

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

David D. Fleming  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) was a resident of Milwaukee County who received FoodShare benefits in Milwaukee County during time periods relevant here.
2. During that period, Respondent's FoodShare card was used to make purchases at [REDACTED], a small corner store that has since been disqualified as a FoodShare vendor due to trafficking violations.

3. [REDACTED] was disqualified for three specific bases that are tied to FS trafficking according to the USDA Food and Nutrition Services (FNS): (1) an unusual number of transactions ending in the same cents value; (2) multiple transactions made by the same purchaser in unusually short time frames; and (3) excessively large purchase transactions (95% of purchases at the store were under \$30 during the relevant time period). The store had one POS device and one cash register making it difficult to ring up large amounts of groceries in a short time period. There was limited counter space and the register is behind a barrier. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts. The store stocked minimal amounts of food items (very little produce or meat). The store did stock non-food items such as tobacco, liquor, clothing and household products. The owner of [REDACTED] admitted to FNS that he allowed FS card users to purchase diapers on the card.
4. Respondent's FoodShare card was used to make the following purchases at [REDACTED]:
- |          |        |         |
|----------|--------|---------|
| 08/05/10 | @ 1211 | \$ 1.00 |
| 11/03/10 | @ 1935 | \$98.89 |
5. On November 3, 2010 Respondent made the following purchases on his FS card:
- |       |              |         |
|-------|--------------|---------|
| @1324 | @ [REDACTED] | \$77.22 |
| @1355 | @ [REDACTED] | \$22.50 |
7. On ---December 19, 2013, Petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent trafficked FS benefits at [REDACTED] with the transactions noted at Finding # 4.

### DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

- ...
1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
  2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

...

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 49.795(2-7).

I note that 7 CFR §271.2 defines "trafficking" as, "the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons."

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...  
*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The FNS did substantial research on trafficking activity and actions associated with trafficking. That [REDACTED] was disqualified as a FoodShare vendor for taking part in trafficking activities with recipients is clear. Nonetheless, that Respondent has committed an IPV is not a clear cut situation; no witnesses saw him do so, thus the agency relies on circumstantial evidence.

The August 5, 2010 transaction is too small and isolated for me to find that it was suspect. The agency records do, however, show that Respondent made two large purchases at mainstream, legitimate retailers approximately 6 hours prior to the large November 3, 2010 transaction at [REDACTED]. It contends that there was no legitimate reason for the November 3, 2010 at 1935 hours [REDACTED] transaction, thus argues that the high dollar amount is clear and convincing evidence of trafficking

Respondent testified that at the time of the November 2010 transaction he was living with a sister about a half block away from [REDACTED]. He testified credibly that, to the best of his recollections some 3 plus

years later, that he the transaction was for a 'meat deal' that [REDACTED] would occasionally have. He stated that [REDACTED] would offer large boxes of various frozen meats that were at a price even cheaper than the prices a large retailers like [REDACTED] and [REDACTED]. His sister had a freezer so it was feasible to store the frozen boxes. Further, it was easy to carry the boxes to residence he was living at as the house was so close to [REDACTED]. He denied any trafficking.

I am not going to impose the IPV sanction here. Though the 1 transaction was larger than the average at [REDACTED] and may raise suspicions, there is a significant standard of proof required in these cases. There are no receipts or other primary source evidence. One transaction does not show a pattern. Again I found Respondent's testimony was credible and offered without any perception by the undersigned of rancor, hostility, exaggeration or deceit. I cannot conclude that the evidence is sufficient to find by clear and convincing evidence that Respondent trafficked his FoodShare benefits under the Code of Federal Regulation definition.

### **CONCLUSIONS OF LAW**

1. That there is not clear and convincing evidence that this Respondent intended to commit the IPV.
2. That the agency cannot disqualify the Respondent from the FoodShare program for one year under an IPV sanction.

**NOW, THEREFORE,** it is

**ORDERED**

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from Respondent's FoodShare case. This action shall be taken within 10 days of the date of this Decision.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

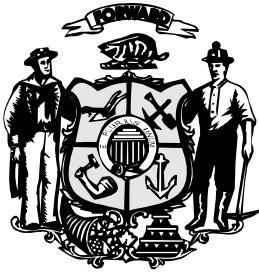
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 14th day of April, 2014

---

\sDavid D. Fleming  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on April 14, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
Attorney Patricia DeLessio